BANK PEMBANGUNAN MALAYSIA BHD v. SEROJA ENGINEERING SDN BHD; TAI MA HEAVY MACHINERY (M) SDN BHD (PETITIONER)

HIGH COURT MALAYA, KUALA LUMPUR
NOORIN BADARUDDIN JC
[COMPANIES (WINDING UP) NO: 28NCC-646-08-2012]
19 AUGUST 2016

BANKRUPTCY: *Proof and priority of debts – Proof of debt – Part of proof of debt issued by creditor rejected by debtor's liquidator – Debtor's liquidator limited interest rate to 6% per annum instead of 10% per annum – Principle of merger – Whether limitation of rate by debtor's liquidator with sound basis – Whether interest rate affected by amendment to s. 43(6) of Bankruptcy Act 1967 – Companies (Winding-up) Rules 1972, r. 92*

CIVIL PROCEDURE: *Judgments and orders – Judgment in default – Banking facilities – Claim by bank against wound up company – Part of proof of debt issued by creditor rejected by debtor's liquidator – Debtor's liquidator limited interest rate to 6% per annum instead of 10% per annum – Whether limitation of rate by debtor's liquidator justified*

On 3 May 2012, Bank Pembangunan Malaysia Bhd ('the applicant') had obtained a judgment in default ('the JID') against Seroja Engineering Sdn Bhd ('the respondent') for banking facilities provided by the former to the latter. Pursuant to the winding up of the respondent on 12 October 2012 by Tai Ma Heavy Machinery (M) Sdn Bhd ('the petitioner'), the applicant prepared and lodged its proof of debt ('the POD'). In support of the POD, the applicant annexed a copy of the JID and respective statement of its accounts issued on 10 April 2013. The applicant later received a notice pursuant to r. 92 of the Companies (Winding-up) Rules 1972 ('the Rules') from the respondent's liquidator ('the liquidator'), rejecting part of the applicant's POD in the amount of RM541,141.03. In the notice, the liquidator limited (i) the rate of interest to 6% per annum instead of 10% per annum; and (ii) the period of interest from 4 May 2012 to 12 October 2012 only instead of from 21 September 2011 to the date of full settlement as awarded by the court in the JID. The applicant filed the present application ('encl. 20'), seeking for an order that (i) the liquidator's decision rejecting part of the POD be reversed and/or varied; and (ii) the liquidator wholly admits the POD. In opposing encl. 20, the liquidator argued that since the interest at the rate of 10% per annum from 21 September 2011 until the date of settlement obtained by the applicant from the JID happened after the amendment to s. 43(6) of the Bankruptcy Act 1967 ('the Act'), which took effect on 1 October 2003, the applicant was therefore allowed to claim the interest not exceeding 6% per annum up to the date of the receiving order granted by the court.

Held (granting order in terms of encl. 20)

(1) The rate and period of interest claimed by the applicant as per the POD had been upheld by the court when granting the JID. When the POD was filed, the applicant claimed for this awarded rate and period of interest up to the date of the winding up of the respondent which was 12 October 2012. The decision of the liquidator in allowing the interest to commence on the day after the JID was without basis and was misconceived. (paras 13-14)

(2) The principle of merger was applicable in this situation. The 10% interest claimed by the applicant in its POD had merged into the judgment sum and as such, this interest was payable by the respondent. Based on r. 87 of the Rules and para. 24 of Schedule C of the Act, only if the interest had not been agreed upon previously between parties then the interest is limited to 6% per annum. However, the interest rate of 10% had been agreed by the parties in writing when the banking facilities were granted to the respondent. Therefore the interest could not be limited to 6%. (paras 14, 18 & 20)

(3) The liquidator's argument in opposing the application was unsustainable. Section 43(6) of the Act, which provides for priority debt, is in respect to the payment of dividend and does not preclude the contractual rate of interest which the appellant was entitled to claim under its POD. (para 22)

Case(s) referred to:

Moscow Narodny Bank Ltd v. Ngan Ching Wen [2004] 2 CLJ 241 FC ***(refd)***

Omega Securities Sdn Bhd v. Ketua Pengarah Insolvensi Malaysia [2012] 5 CLJ 868 HC ***(refd)***

Perwira Affin Bank Bhd v. Lim Ah Hee [2004] 2 CLJ 787 FC ***(refd)***

Re Ang Swee Hian; ex p Avenue Securities Sdn Bhd [2008] 10 CLJ 467 HC ***(refd)***

Re Earnest Cheong Yong Yin; ex p United Malayan Banking Corporation Bhd [1997] 1 LNS 50 HC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 42, 43(6)
Companies Act 1965, s. 279
Companies (Winding-up) Rules 1972, rr. 87, 92, 93

For the applicant - Veronica Dominique; M/s Prasad Abraham & Assocs
For Director General of Insolvency - Norazlina Md Nasir, Ezwan Abdul Majid & Eszanizam Muhammad; FCs

Reported by Najib Tamby

JUDGMENT

Noorin Badaruddin JC:

[1] By way of a notice of motion dated 28 April 2016 (encl. 20), the applicant moved this court for an order that the decision of the liquidator for the respondent ('liquidator') *vide* notice dated 11 April 2016 rejecting part of the applicant's proof of debt ('POD') amounting to RM541,141.03 be reversed and/or varied and that the liquidator be ordered to admit the applicant's POD in whole or on such sums determined by the court.

[2] Briefly, the applicant contended that the liquidator had limited the applicant's claim for interest to a period from 4 May 2012 to 12 October 2012 and also the rate of interest, when in effect the applicant's imposition of late payment interest had been agreed upon and had merged into the judgment sum obtained by the applicant and was thus payable. The applicant further contended that it had obtained a regular judgment, which is the basis for the judgment of the applicant's POD. As such, the liquidator's rejection of part of the applicant's POD in the amount of RM541,141.03 is prejudicial to the applicant, who has been denied of their full entitlement in law.

[3] The learned Federal Counsel for official receiver as the liquidator on the other hand submitted that since the interest at the rate of 10% per annum from 21 September 2011 until the date of settlement was obtained by the applicant from the judgment happened after the amendment to s. 43(6) of the Bankruptcy Act 1967, the applicant is therefore allowed to claim the interest not exceeding 6% per annum up to the date of the receiving order granted by the court. As such the applicant's application must be dismissed.

Background Facts

[4] On 3 May 2012, the applicant obtained judgment in default against the respondent company for banking facilities provided by the applicant to the respondent ('judgment').

[5] Pursuant to the winding up of the respondent on 12 October 2012 by the petitioner herein, the applicant then proceeded to prepare and lodge its POD on 2 May 2013.

[6] In the applicant's POD a copy of the judgment and the applicant's respective statement of accounts issued on 10 April 2013 are annexed to support the applicant's POD.

[7] On 15 April 2016, the applicant's solicitors had received the notice pursuant to r. 92 of the Companies (Winding-up) Rules 1972 from the liquidator for the respondent, rejecting part of the applicant's POD in the amount of RM541,141.03.

[8] In the notice, the liquidator had limited the rate of interest to 6% per annum instead of 10% per annum as awarded by the court in the said judgment. The judgment dated 3 May 2012 stated as follows:

> Tiada kehadiran telah dimasukkan oleh Defendan Pertama dalam tindakan ini
>
> ADALAH PADA HARI INI DIHAKIMKAN bahawa Defendan Pertama hendaklah membayar kepada Plaintif:-
>
> (a) Jumlah terhutang di bawah kemudahan BG1 yang berjumlah sebanyak RM5,118.082.00;
>
> (b) Faedah pada kadar 10% setahun ke atas jumlah RM5,118,082.00 daripada 21.09.2011 sehingga penyelesaian penuh;
>
> (c) Jumlah terhutang di bawah kemudahan BG2 yang berjumlah sebanyak RM1,690,815.20;
>
> (d) Faedah pada kadar 10% setahun ke atas jumlah RM1,690,815.20 daripada 21.09.2011 sehingga penyelesaian penuh; dan
>
> (e) Kos tindakan ini sebanyak RM287.80

Court's Findings

[9] Section 279 of the Companies Act 1965 states:

> Any person aggrieved by any act or decision of the liquidator may apply to the Court which may confirm, reverse or modify the act or decision complained of and make such order as it thinks just.

[10] Further, rr. 92 and 93 of the Companies (Winding-up) Rules 1972 state:

> 92. The Liquidator shall examine every proof of debt lodged with him and the grounds of the debt, and shall in writing admit or reject it, in whole or in part, or require further evidence in support of it. If he rejects a proof he shall state in writing in Form 59 to the creditor the grounds of the rejection.
>
> 93. If a creditor or contributory is dissatisfied with the decision of the liquidator in respect of a proof, the Court may, on the application of the creditor or contributory, reverse or vary the decision; but subject to the power of the Court to extend the time, no application to reverse or vary the decision of the liquidator in a winding-up by the Court shall be entertained, unless notice of the application is given before the expiration of twenty-one days from the date of service of the notice of rejection.

[11] It was averred by the applicant in the supporting affidavit that pursuant to the banking facilities, the rate and period of interest claimed by the applicant in the POD had already been agreed between the respondent and the applicant when the banking facilities were granted to the respondent.

[12] In the said liquidator's notice, it is shown that whilst the liquidator had set out the judgment obtained by the applicant on 3 May 2012, the liquidator had limited the rate of interest to 6% per annum instead of 10% per annum as awarded by the court in the said judgment. The liquidator had limited the period of interest from 4 May 2012 to 12 October 2012 only instead of from 21 September 2011 to date of full settlement as awarded by the court in the said judgment.

[13] It is a fact that the rate and period of interest claimed by the applicant as per the POD had been upheld by the court when granting the judgment. When the POD was filed, the applicant claimed for this awarded rate and period of interest up to the date of the winding up of the respondent, ie, until 12 October 2012.

[14] This court is of the considered view that the decision of the liquidator in allowing the interest to commence on the day after the judgment is without basis and is misconceived. The principle of merger is applicable in this situation. Although the applicant had imposed interest which had accrued at an earlier date, this had merged into the judgment and is thus payable by the respondent. In *Perwira Affin Bank Bhd v. Lim Ah Hee* [2004] 2 CLJ 787, the Federal Court held as follows:

> [6] In the instant case, the judgment was obtained on 23.10.1987. Following *United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin* [2002] 2 CLJ 413 FC, even though interest was calculated from 1 December 1985, it merged into the judgment debt and therefore the date and interest became due was the date of the judgment, not the earlier date. The period to be calculated was from the date of judgment to the date of filing the bankruptcy notice.

[15] Earlier in the High Court, Kamalanathan Ratnam J (as he then was) in *Re: Earnest Cheong Yong Yin; Ex Parte: United Malayan Banking Corporation Berhad* [1997] 1 LNS 50 stated as follows:

> … Hence where the action for recovery is taken within the limitation period the judgment creditor would be entitled to the higher agreed rate of interest but if he only takes action to recover the debt after six years he would be allowed the maximum rate of 8% per annum on the principal sum due.

[16] In *Moscow Narodny Bank Ltd v. Ngan Ching Wen* [2004] 2 CLJ 241; [2005] 3 MLJ 693, the Federal Court speaking through the judgment of Abdul Hamid Mohamad FCJ (as he then was) stated:

> 54. The judgment of this court in *United Malayan Banking Corporation Bhd* was delivered on 5.4.2002, more than a year before leave was granted in this case. In that case on 15 October 1987, the appellant had obtained summary judgment against the respondent for RM95,864.93 on an overdraft account together with interest at 15%pa thereon with monthly

rests from 1 April 1986 until full realisation, and for RM66,051.74 on overdue trust receipt account together with interest at 16% pa thereon until full settlement, and RM350 costs. On 24 January 1996, eight years and three months after the date of judgment, the appellant filed a bankruptcy notice against the judgment debtor amounting to RM229,563.68 including interest thereon.

55. Abdul Malek Ahmad FCJ, delivering the judgment of the court, said, at p 397 of the report:

> The Court of Appeal had decided that the 'the date on which the interest became due' was the date of the breach which would be before the judgment date. We are of the considered view that this finding is erroneous as the arrears of interest are in respect of a judgment debt, which as we have stated earlier in the principal sum and the prejudgment interest, and so the date on which the interest on the judgment debt became due must surely mean the judgment date.

[17] In *Omega Securities Sdn Bhd v. Ketua Pengarah Insolvensi Malaysia* [2012] 5 CLJ 868, Mah Weng Kwai J (as he then was) stated:

> [23] There is a plethora of cases establishing the principle that when interest has accrued at an earlier date and a judgment is obtained thereafter, the interest is merged into the judgment sum based on the Merger Principle.
>
> …
>
> [25] In this case the court applied the Merger Principle and allowed interest for the period from 6 June 1998 (the day after default of payment by judgment debtor) as per the judgment in default to 14 March 2001 (date of judgment in default) to merge into the judgment debt and consequentially the date the interest became due was the date of the judgment (14 March 2001) and not the earlier date.

[18] Premised on the principles laid down in the above authorities, this court found for a fact that the 10% interest as claimed by the applicant in its POD has merged into the judgment sum and as such this interest is payable by respondent. Further and as stated earlier, the interest rate of 10% had been agreed by the parties in writing when the banking facilities were granted to the respondent and therefore, the interest claimed by the applicant ought not to be limited. Rule 87 of the Companies (Winding-up) Rules 1972 states as follows:

> 87. On any debt or sum certain, payable at a certain time or otherwise, whereon interest is not reserved or agreed for, and which is overdue at the date of the winding up order or resolution, the creditor may prove for interest at a rate not exceeding six per centum per annum to that date from the time when the debt or sum was payable, if the debt or sum is payable otherwise, then from the time when a demand in writing has been made, giving notice that interest will be claimed from the date of the demand until the time of payment.

[19] Further s. 42 of the Bankruptcy Act 1967 states that the rules in Schedule C shall be observed with respect to the mode of proving debts, the rights of proof by secured and other creditors, the admission and rejection of proofs and other matters and in regards to interest, it is reiterated in para. 24 of Schedule C as follows:

Interest

24. On any debt or sum certain payable at a certain time or otherwise, whereon interest is not reserved or agreed upon and which is overdue at the date of the receiving order and provable in bankruptcy, the creditor may prove for interest at a rate not exceeding six per centum per annum to the date of the receiving order from:

(a) if the debt or sum is payable by virtue of a written instrument at a certain time, the time the debt or sum was payable; or

(b) if the debt or sum is payable otherwise that by virtue of a written instrument, the time when demand in writing was made.

[20] As set out in the above provisions, only if the interest has not been agreed upon previously between the parties, then the interest is limited to 6% per annum which is different from the present case wherein there has been a prior agreement between the parties on the interest and therefore the interest cannot be limited to 6% per annum.

[21] This court further agrees with the submission of the applicant's learned counsel that from 4 May 2012 to the date of the respondent's winding up as being claimed by the applicant, ie, 12 October 2012, is merely a few days over five months which is well within the six year limitations and as such the post-judgment interest of 10% per annum on the principal sum is payable. In *Re Ang Swee Hian; Ex P Avenue Securities Sdn Bhd* [2008] 10 CLJ 467 Kang Hwee Gee J (as he then was) explained at p. 473 of the report as follows:

[8] Section 6(3) of the Limitation Act 1953 provides clearly that an action upon any judgment can only be brought before the expiration of 12 years and that no arrears in respect of any interest shall be recovered after the expiration of six years.

[9] In the instant case therefore for the purpose of determining when the period of limitation should begin in respect of both an action to claim the judgment sum and the interest due thereunder, time should start from the date of judgment, that is to say 22 September 1995. This is so notwithstanding that the Sessions Court judge had subsequently varied the interest rate obtained by the judgment creditor from 14% to 8% per annum as interest rate can only exist if there is a judgment and the judgment in this case was made on 22 September 1995.

A [10] Having considered the judgment creditor's petition it is clear that what the judgment creditor is claiming is the principal sum of RM172,900.89 and interest on the principal sum at 8% of RM85,329.42 amounting to RM258,230.31. The claim on the principal sum has not exceeded twelve years and the judgment creditor is only claiming interest up to a period of six years from the date of judgment. It follows therefore
B the judgment creditor has not contravened s. 6(3) of the Limitation Act 1953.

[11] The language in s. 6(3) itself is clear. In respect of the claim on the judgment the words used is "shall not be brought after the expiration of twelve years" and in respect of the claim on the arrears of interest the
C words used is "no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due".

[12] The Federal Court in the later case of *Perwira Affin Bank Bhd, supra,* per Abdul Hamid Mohamad FCJ has interpreted the sub-section to mean
D that:

> ... while a bankruptcy proceeding may be brought within 12 years of the date of judgment, arrears of interest may only be claimed for a period of six years from the date of the judgment.

[13] The judgment appears to have confirmed the court's two previous
E judgments in *United Malayan Banking Corp Bhd, supra* and *Moscow Narodny Bank Ltd v. Ngan Ching Wen* Rayuan Sivil No. 03-1-2003 (W) by the following passage appearing in *Perwira Affin Bank Bhd* [2004] 2 CLJ 787, *supra*:

> Again, with respect, I am of the view that the learned judge was
F wrong when he said that the Act does not prohibit the claim for arrears of interest beyond six years. Both in *Ernest Cheong* and *Moscow Narodny Bank Bhd* it was held and it is also my view (even though for different reasons) that in a bankruptcy proceeding arrears of interest may only be claimed for a period of six years from the date of judgment.

G **[22]** Before concluding, the argument forwarded by the learned Federal Counsel that since the interest at the rate of 10% per annum from 21 September 2011 until the date of settlement obtained by the applicant from the judgment happened after the amendment to s. 43(6) of the Bankruptcy Act 1967 (which took effect on 1 October 2003) the applicant
H is therefore allowed to claim the interest not exceeding 6% per annum up to the date of the receiving order granted by the court, is unsustainable. This court is of the considered view that s. 43(6) of the Bankruptcy Act 1967 which provides for priority debt is in respect to the payment of dividend and does not preclude the contractual rate of interest which the appellant is
I entitled to claim under its POD. Section 43(6) clearly states:

43 Priority of debts

Interest of debts

(6) Where a debt has been proved upon a debtor's estate and such debt includes interest or any pecuniary consideration *in lieu* of interest, such interest or consideration **shall for the purpose of dividend be calculated at a rate not exceeding six per centum per annum,** up to the date of the receiving order is granted by the court. (emphasis added)

[23] In the upshot, this court granted order in terms of encl. 20 with no order as to costs.